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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.
No. 525.

RUTH K. ARMSTRONG,

Petitioner,

vs.

LEE R. ARMSTRONG,

Respondent.

PETITIONER'S REPLY BRIEF.

The respondent's brief in opposition to petition for writ of certiorari contends that a Federal question was neither presented to nor decided by the highest state court in which a decision could be rendered, *viz.*, the District Court of Appeal, and that as a consequence, the Supreme Court of the United States has no jurisdiction to review the decision of the state court. Petitioner replies to such contentions herein.

The Federal Question Upon Which the Petition for Writ of Certiorari Is Based Was Necessarily Involved in the Determination of the Cause by the State Court and Was Determined by the State Court Adversely to Petitioner.

It is settled that where the highest state court in which a decision may be had considers a Federal question as properly raised in the appellate proceedings and passes upon or determines such question adversely to the Federal

claim, the Federal question is raised for the purpose of conferring jurisdiction on the United States Supreme Court, even where the Federal question was not raised in the trial court. (*Home Ins. Co. v. Dick,* 281 U. S. 397, 407, 74 L. Ed. 926, 933; *Whitfield v. Ohio,* 207 U. S. 431, 436, 80 L. Ed. 778, 782.)

In *New York ex rel. Bryant v. Zimmerman,* 278 U. S. 63, 67, 73 L. Ed. 184, 187, where the record of proceedings in the trial court was somewhat vague, this court, in passing on whether a Federal question had been properly raised, stated:

> "No particular form of words or phrases is essential, but only that the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision and in due time. And if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented.
>
> "Of course, the decision must have been against the claim of invalidity, but it is not necessary that the ruling shall have been put in direct terms. If the necessary effect of the judgment has been to deny the claim, that is enough.
>
> "The appeal was not accompanied by an assignment of errors, but this was not an omission. The local practice does not recognize an assignment of errors as known in other jurisdictions; it merely requires the appellant to set forth in a printed brief 'the points to be relied on by him.' In the opinion delivered, which for present purposes is deemed part of the record, the appellate division stated distinctly that the relator's claim of invalidity was grounded on asserted repug-

nance to both the due process of law clause of the state Constitution and the clauses hereinbefore quoted from the 14th Amendment."

In *Murray v. Charleston,* 96 U. S. 432, 441-442, 24 L. Ed. 760, 761-762, the court stated the applicable rule as follows:

"The jurisdiction of this court over the judgments of the highest courts of the States is not to be avoided by the mere absence of express reference to some provision of the Federal Constitution. Wherever rights acknowledged and protected by that instrument are denied or invaded, under the shield of state legislation, this court is authorized to interfere. The form and mode in which the federal question is raised in the state court is of minor importance, if, in fact, it was raised and decided.

"In questions relating to our jurisdiction, undue importance is often attributed to the inquiry whether the pleadings in the state court expressly assert a right under the Federal Constitution. The true test is not whether the record exhibits an express statement that a federal question was presented, but whether such a question was decided, and decided adversely to the federal right. Everywhere in our decisions it has been held that we may review the judgments of a state court when the determination or judgment of that court could not have been given without deciding upon a right or authority claimed to exist under the Constitution, laws or treaties of the United States, and deciding against that right. Very little impor-

> tance has been attached to the inquiry whether the federal question was formally raised. In Crowell v. Randell, 10 Pet. 368, it was laid down, after a review of almost all our previous decisions, 'That it is not necessary the question should appear on the record to have been raised, and the decision made in direct and positive terms, in *ipsissimis verbis,* but that it is sufficient if it appears by clear and necessary intendment that the question must have been raised, and must have been decided, in order to have induced the judgment.' "

In the case at bar, assuming for argument but not conceding that the Federal question was not raised in the trial court, the Federal question was raised by petitioner on appeal at the first opportunity in the District Court of Appeal in the only way it could be raised under California state practice, *viz.,* by a statement in petitioner's opening brief filed in the District Court of Appeal. There has never been any requirement in California for an assignment of errors on appeal, as there was at common law. (*Hutton v. Reed,* 25 Cal. 479; *Fawkes v. Reynolds,* 190 Cal. 204.) There was no requirement for any assignment of error on appeal when this appeal was taken. The Rules on Appeal for the District Court of Appeal, State of California, effective during this appeal, provide (Rule 15):

> "Each point in a brief shall appear separately under an appropriate heading, with subheadings if desired. Such headings need not be technical 'assignments of errors' but should be concise headings which are generally descriptive of the subject matter covered."

At page 24 petitioner's opening brief contains the following heading, *viz.:*

"III.

THE TRIAL COURT LACKED JURISDICTION TO VACATE AND SET ASIDE THE INTERLOCUTORY DIVORCE JUDGMENT AND SUCH ORDER IS VOID."

The first paragraph under such heading is as follows:

"It is fundamental that there must be 'due notice' of judicial proceedings under the 'due process' clauses of the Federal and State Constitutions. If there is not, the court has no jurisdiction and its action is void."

Under such heading, at pages 25-27, in support of her contention that the notice was unconstitutional under the United States Constitution, petitioner cited and quoted from three leading decisions of the United States Supreme Court passing upon the sufficiency of notice or the opportunity to be heard under the due process clause of the Fourteenth Amendment to the United States Constitution, *viz., Hovey v. Elliott,* 167 U. S. 409; *Roller v. Holly,* 176 U. S. 398 and *Anderson National Bank v. Luckett,* 321 U. S. 233. Thus, the question was clearly presented on appeal to the state court in the required manner.

Petitioners said opening brief filed in the District Court of Appeal, as well as all other briefs and petitions filed by the parties in the state courts, are included in the certified record filed in this court, although not all are included in the printed record.

Respondent's statement in his brief in opposition, page 10, that the first time the constitutional question was

raised was in the petition for hearing by the Supreme Court of California is directly contrary to the fact, as hereinabove pointed out.

It is clear, as hereinabove shown, that petitioner did raise the Federal question at the first opportunity in the District Court of Appeal. It is also clear that since the trial court's jurisdiction to make the order in question depended on whether or not petitioner had been given a reasonable and adequate notice of hearing, as required by the due process clause of the United States Constitution, the District Court of Appeal necessarily had to and must have considered the Federal question and determined it.

In its opinion the District Court of Appeal referred to petitioner's contentions regarding the jurisdictional question, that is the Federal question, as follows:

> "According to the appellant's brief the basic questions involved are * * * 'Whether the trial court had jurisdiction, in any event, to set aside and vacate the interlocutory divorce judgment.'" [R. 72.]
>
> "The record herein discloses no abuse of discretion in the vacation of the default interlocutory judgment, either in respect to the matter itself, *notice* and conduct of the hearing, *jurisdiction,* * * * or otherwise." [R. 73.] (Italics ours.)

While as pointed out in the petition for writ of certiorari, these references in the opinion of the District Court of Appeal to the Federal question are brief, they do show that that court considered and passed on the Federal question. There is no requirement, in any event, that the state appellate court pass on a constitutional question in terms. (*Consolidated Coal Co. v. Illinois,* 185 U. S. 203, 206-207, 46 L. Ed. 872, 875.) If there should be any

doubt in that connection, the certificate of the Hon. John M. York, Presiding Justice of said District Court of Appeal, dated February 18, 1948, and filed in this proceeding, reference to which is hereby made, shows that the Federal question was raised in and determined by the District Court of Appeal, which clarifies any possible ambiguity in that connection.

Petitioner respectfully submits that a substantial Federal question was properly raised in the state court, that the question was necessarily involved in the determination of the cause by the state court, that the question was considered by the highest state court in which a decision could be had and was determined by that court adversely to petitioner, and that this Honorable Court has jurisdiction to review and properly should review and reverse the judgment of the District Court of Appeal.

Dated: February 20, 1948.

HUBERT T. MORROW,
Counsel for Petitioner.

JOHN C. MORROW,
Of Counsel.